

The Honorable Jamal N. Whitehead

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KURT A. BENSHOOF,)	
)	No. 2:24-cv-00382-JNW
Plaintiff,)	
v.)	DEFENDANT'S MOTION TO
)	DISMISS PURSUANT TO FED. R.
DAVID S. KEENAN,)	CIV. P. 12b(5) and (6)
)	
Defendant.)	<i>Noted for December 23, 2024</i>

I. INTRODUCTION

Defendant, King County Superior Court Judge David Keenan, moves this Court for an order of dismissal pursuant to Fed. R. Civ. P. 12(b)(5) and (6). Plaintiff has not effected service on Judge Keenan. Moreover, Judge Keenan is entitled to both sovereign immunity under the Eleventh Amendment and judicial immunity. Because amendment would be futile in light of immunity, this case should be dismissed with prejudice.

II. STATEMENT OF FACTS

A. Procedural Facts

Plaintiff Benshoof filed this lawsuit on March 15, 2024 and requested in forma pauperis status. Dkt. 1. Magistrate Judge Michelle Peterson recommended that Benshoof be denied in forma pauperis status based on his refusal to provide sufficient information about his ability to pay the

1 filing fee. Dkt. 14 at 3. Benshoof moved to disqualify this Court, questioning Judge Whitehead's
 2 impartiality and accusing this Court of conspiring against him. Dkt. 16. As this Court noted in the
 3 order denying that motion to disqualify, Benshoof had filed similar motions in other cases. Dkt.
 4 18. Chief Judge Estudillo affirmed this Court's denial of the motion to disqualify. Dkt. 21. This
 5 Court granted Benshoof's request for in forma pauperis status and accepted the complaint for filing
 6 on July 30, 2024. Dkts. 19, 20. Benshoof has not requested issuance of a summons pursuant to
 7 Fed. R. Civ. P. 4(b).

8 B. Facts Alleged in the Complaint

9 The complaint in this matter makes clear that the actions on which the complaint are based
 10 are actions taken by Judge Keenan in his role as a King County Superior Court judge.¹ Dkt. 1-1,
 11 at 1 (alleging defendant showed "flagrant disregard for First Amendment" "[a]s a King County
 12 Superior Court judge"). Plaintiff alleges that he communicated "questions and concerns" about
 13 proceedings before Judge Keenan on Judge Keenan's Twitter and Facebook accounts. *Id.* at 2.
 14 Benshoof alleges that Judge Keenan blocked him from those accounts after Benshoof made posts
 15 that "were critical of Defendant's judicial misconduct." *Id.* at 4-5.

16 Benshoof's single cause of action is a 42 U.S.C. § 1983 claim based on an alleged violation
 17 of the First Amendment. *Id.* at 5. Benshoof seeks damages and declaratory relief that Judge
 18
 19

20 ¹Benshoof's animus toward Judge Keenan arises from a parentage action over which Judge Keenan
 21 presided. *Benshoof v. Cliber*, 2024 WL 3936917 (Wash. App. Aug. 26, 2024), details the abusive
 22 litigation Benshoof conducted in the King County Superior Court, which ultimately led to a
 23 vexatious litigant order that temporarily restricts his abusive litigation against the defendants in
 that case, including in any superior courts in the state of Washington. *Id.* That order was affirmed
 on appeal, with the appellate court concluding that the trial court's finding that Benshoof "engaged
 in an extensive pattern of abusive litigation and weaponization of the court system" was "amply
 supported by the record." *Id.* at *5.

1 Keenan's actions violated the First Amendment. *Id.* at 7-8. Benshoof does not seek prospective
2 relief. *Id.*

3 III. ISSUES PRESENTED

- 4 1. Should this lawsuit be dismissed based on improper service? **Yes.**
- 5 2. Is this lawsuit barred by the Eleventh Amendment? **Yes.**
- 6 3. Is the claim for damages barred by judicial immunity? **Yes.**
- 7 4. Would amendment be futile? **Yes.**

8 IV. AUTHORITY

9 A. FED. R. CIV. P. 12(B) STANDARDS.

10 Under Rule 12(b)(5), courts may dismiss a claim based on insufficient service of process.
11 Fed. R. Civ. P. 12(b)(5). "Once service is challenged, plaintiffs bear the burden of establishing that
12 service was valid under Rule 4." *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). Without
13 personal service in accordance with Rule 4, the district court lacks jurisdiction to render a personal
14 judgment against a defendant. *Hutchinson v. United States*, 677 F.2d 1322, 1328 (9th Cir. 1982).

15 A Rule 12(b)(6) motion to dismiss should be granted if the claimant fails to allege "enough
16 facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S.
17 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that
18 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
19 alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). Dismissal under Rule
20 12(b)(6) is appropriate where there is a lack of a cognizable legal theory to support a plaintiff's
21 claim for relief, including where a prayer for relief is barred as a matter of law. See *Balisteri v.*
22 *Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988) (citing *Robertson v. Dean Witter*
23 *Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984)).

B. THIS LAWSUIT SHOULD BE DISMISSED DUE TO INSUFFICIENT SERVICE OF PROCESS.

Fed. R. Civ. P. 4 requires plaintiffs to serve defendants with a summons and copy of the complaint and sets forth the specific requirements for doing so. Rule 4(m) provides the timeframe in which service must be made and states in relevant part:

If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

“[I]n the absence of proper service of process, the district court has no power to render any judgment against the defendant’s person or property unless the defendant has consented to jurisdiction or waived the lack of process.” *S.E.C. v. Ross*, 504 F.3d 1130, 1138–39 (9th Cir. 2007).

If the plaintiff does not timely serve a defendant, Rule 4(m) requires the court to grant an extension of time for service if the plaintiff shows good cause, and permits the court to grant an extension in the absence of good cause. *Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007). A district court also has discretion to “quash service.” *S.J. v. Issaquah Sch. Dist. No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006). If the plaintiff does not show good cause for failing to comply with Rule 4(m), the court should either dismiss the complaint or grant a specific extension of time for service. “At a minimum, ‘good cause’ means excusable neglect.” *See Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir. 1991). The court’s discretion to choose between dismissal and an extension of time under Rule 4(m) is broad. *Efaw*, 473 F.3d at 1041.

Plaintiff was required to serve the summons and complaint on Judge Keenan by October 30, 2024. *See* Fed. R. Civ. P. 4(m); Fed. R. Civ. P. 6(a)(1); Dkt. 20. That date has passed without Plaintiff requesting issuance of a summons.

1 Plaintiff's refusal to request issuance of a summons in this case is part of a pattern of
 2 obstinate refusal to follow court rules, not excusable neglect. Such refusal does not constitute good
 3 cause. His recent incarceration does not excuse his refusal to request a summons, as his numerous
 4 filings demonstrate his ability to communicate with the Court while incarcerated. Benshoof's claim
 5 that he cannot serve Judge Keenan because he is without access to his address is specious, given
 6 that Judge Keenan is represented by counsel and issuance of the summons does not require Judge
 7 Keenan's home address where Benshoof could request a waiver of service from counsel. However,
 8 as in other cases, Benshoof prefers to harass judges, police officers and public officials by
 9 improperly serving them at their homes in lieu of requesting a waiver of service. *See Benshoof v.*
 10 *Admon, et al.*, 2:23-cv-1392-JNW, Dkt. 162, 163; *Benshoof v. Shoreline, et al.*, 2:24-cv-343-TL,
 11 Dkt. 30.

12 Benshoof's disdain for the authority of courts is further illustrated by his recent conviction
 13 for 80 counts of violating a court order in Seattle Municipal Court. Dkt. 35, Ex. A.

14 Benshoof has a pattern of harassing judges who have presided over his cases by filing
 15 frivolous lawsuits, naming them as defendants. *See Benshoof v. Fauci, et al.*, 2:22-cv-1281-LK,
 16 Dkt. 1, 7 (naming Seattle Municipal Court Judges Anita Crawford-Willis, Willie Gregory and
 17 Mary Lynch, and King County Superior Court Judges Jim Rogers, Sean O'Donnell, and David
 18 Keenan as defendants; dismissed for lack of subject matter jurisdiction and failure to state a claim);
 19 *Benshoof v. Keenan*, 2:23-cv-751-RAJ, Dkt. 1-2, 22 (naming Judge Keenan as defendant dismissed
 20 for lack of jurisdiction); *Benshoof v. Admon, et al.*, 2:23-cv-1392-JNW, Dkt. 9, 245 (naming
 21 Seattle Municipal Court Judges Anita Crawford-Willis, Willie Gregory and Mary Lynch, King
 22 Superior Court Judges Marshall Ferguson, David Keenan, Steven Rosen and Sandra Widlan,
 23 Washington Supreme Court Justice Steven Gonzalez, and Western District of Washington Judges

David Estudillo, Ricardo Martinez and Richard Jones as defendants; dismissed for failure to state a claim and on immunity bases); *Benshoof v. Ferguson, et al.*, 2:24-cv-808-JHC, Dkt. 1 (naming King County Superior Court Judge Marshall Ferguson and this Court as defendants; dismissed on immunity bases). The fact that Benshoof has a demonstrated history of abusing the court system should factor into this Court's exercise of discretion, and this case should be dismissed.

C. JUDGE KEENAN HAS SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT.

A federal court generally may not hear a suit brought by any person against a nonconsenting state. *Munoz v. Superior Court of Los Angeles County*, 91 F.4th 977, 980 (9th Cir. 2024). The prohibition applies when an arm of the state is a defendant. *Id.* The superior courts of states have sovereign immunity as an arm of the state. *Id.* As the Ninth Circuit explained in *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987):

The official name of the court is the Superior Court of the State of California; its geographical location within any particular county cannot change the fact that the court derives its power from the State and is ultimately regulated by the State. Judges are appointed by California's governor, and their salaries are established and paid by the State.

The same is true for the King County Superior Court. *See State ex rel. Edelstein v. Foley*, 6 Wash.2d 444, 107 P.2d 901 (Wash. 1940) (holding that superior court judges are state officers for purposes of the state constitution because vacancies are filled by the governor, salaries are paid in part by the state, and based on the character and extent of their jurisdiction); Wash. Const. Art. 4, § 13 (providing that one-half of the salary of superior court judges is paid by the state); RCW 43.03.012 (establishing the statewide salary for superior court judges).

For purposes of the Eleventh Amendment, the superior court is a state agency. *Munoz*, 91 F.4th at 980. A suit against the superior court is a suit against the state and is barred by the Eleventh Amendment. *Id.* Likewise, suits against superior court judges are suits against the state and barred by the Eleventh Amendment. *Id.*

1 In *Munoz*, former and current pretrial detainees brought a § 1983 action against the county
 2 superior court and the superior court judge, alleging that the judge’s bail decisions violated various
 3 constitutional provisions. *Id.* at 979. The Ninth Circuit affirmed the district court’s dismissal of
 4 the lawsuit as to both the superior court and the judge based on Eleventh Amendment immunity.
 5 *Id.* at 981 (stating the “Eleventh Amendment immunity is a threshold jurisdictional issue, and we
 6 have no power to resolve claims brought against state courts or state court judges acting in a
 7 judicial capacity.”) The same principle applies to this case. This lawsuit against Judge Keenan is
 8 a suit against the state and is barred by the Eleventh Amendment.

9 Finally, the *Ex parte Young*, 209 U.S. 123 (1908), exception to sovereign immunity has no
 10 application because Benshoof has not sought prospective relief. *Koala v. Kholsa*, 931 F.3d 887,
 11 895 (9th Cir. 2019) (a suit against a state officer can only proceed under *Ex parte Young* if it seeks
 12 prospective injunctive relief against a state official). Even if he did, an injunction against a state
 13 court judge “would be a violation of the whole scheme of our Government.” *Whole Women’s*
 14 *Health v. Jackson*, 595 U.S. 30, 39 (2021). In fact, 42 U.S.C. § 1983 expressly prohibits “injunctive
 15 relief” “against a judicial officer for an act or omission taken in such officer’s judicial capacity.”
 16 *See also Munoz*, 91 F.4th at 981.

17 **D. JUDGE KEENAN HAS JUDICIAL IMMUNITY FROM DAMAGES CLAIMS.**

18 Even if this suit were not barred by the Eleventh Amendment, Judge Keenan would still be
 19 entitled to judicial immunity against any claim for damages. Judges are generally immune from
 20 suit for money damages. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001). The
 21 Ninth Circuit has identified the following factors as relevant to determine whether a suit is based
 22 on judicial acts that are entitled to absolute judicial immunity:

23 (1) the precise act is a normal judicial function; (2) the events occurred in the judge’s
 chambers; (3) the controversy centered around a case then pending before the judge; and

1 (4) the events at issue arose directly and immediately out of a confrontation with the
2 judge in his or her official capacity.

3 *Id.* Judicial immunity is not limited to official judicial rulings. *Lund v. Cowen*, 5 F.4th 964, 971 (9th
4 Cir. 2021). “Subjecting judges to liability for the grievances of litigants ‘would destroy that
5 independence without which no judiciary can be either respectable or useful.’” *Id.* (quoting
6 *Bradley v. Fisher*, 80 U.S. 335, 347 (1871)).

7 In this case, Benshoof alleges that Judge Keenan blocked him from making comments on
8 social media that pertained to Benshoof’s family court matter, which Judge Keenan presided over
9 in King County Superior Court No. 21-5-00680-6 SEA. Dkt. 1, at 3. Benshoof attempted to submit
10 “questions and concerns” about those proceedings and Judge Keenan’s conduct to Judge Keenan
11 via social media. *Id.*, at 3-4. Judge Keenan blocked Benshoof from these ex parte contacts. *Id.*

12 In regard to the first *Duvall* factor, preventing ex parte communications is a normal judicial
13 function. *See* Washington State Code of Judicial Conduct Rule 2.9A (“A judge shall not initiate,
14 permit or consider ex parte communications”). As to the second factor, the events did not occur at
15 a physical location but occurred on social media accounts through which, as alleged, Judge Keenan
16 communicates with the public about his activities as a superior court judge. As to the third factor,
17 Benshoof alleges that his comments centered around King County Superior Court No. 21-5-00680-
18 6 SEA. Dkt. 1, at 3. As to the fourth factor, Benshoof alleges that the ex parte “questions and
19 comments” blocked by Judge Keenan arose directly from Judge Keenan’s acts in his official
20 capacity presiding over that case. *Id.* All of these factors weigh in favor of concluding that Judge
21 Keenan is entitled to judicial immunity.

22 **E. AMENDMENT WOULD BE FUTILE.**

23 The decision whether to grant leave to amend is within the sound discretion of the trial
court. *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008). Leave to amend

1 may be denied if amendment would be futile. *Id.* Given Judge Keenan's immunity under both the
2 Eleventh Amendment and the common law judicial immunity doctrine, amendment would be
3 futile.

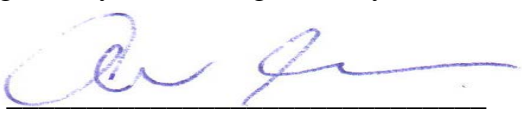
4 **V. CONCLUSION**

5 This case should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(5) and (6).

6 *I certify that this Memorandum contains 2,528 words in compliance with Local Civil*
7 *Rules.*

8 DATED this 25th day of November, 2024.

9 LEESA MANION (she/her)
10 King County Prosecuting Attorney

11 By: 
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17 **CERTIFICATE OF FILING AND SERVICE**

18 I hereby certify that on November 25, 2024, I electronically filed the foregoing document
19 with the Clerk of the Court using the CM/ECF E-filing system which will send automatic
20 notification to the following:

21 Kurt A. Benshoof
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DEFENDANT'S MOTION TO DISMISS PURSUANT
TO FED. R. CIV. P. 12b(5) and (6)
[No. 3:24-cv-00382-JNW] - 9


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1 I also hereby certify that on November 26, 2024, I sent courtesy copy of the same via US
2 Postal Service to the following:

3 Kurt A. Benshoof
4 B/A 2024-008067
5 King County Correctional Facility
6 500 Fifth Ave.
7 Seattle, WA 98104

8 I declare under penalty of perjury under the laws of the United States of America and the
9 State of Washington that the foregoing is true and correct.

10 DATED this 25th day of November, 2024.



11 RAFAEL A. MUNOZ-CINTRON
12 Paralegal I – Litigation Section
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